OAH 7-0900-22671-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA COMMISSIONER OF HEALTH

In the Matter of the Appeal
of Tsz Lai d/b/a Asian Hon

ORDER ON MOTION FOR SUMMARY DISPOSITION

This matter is before Administrative Law Judge Richard C. Luis on a Motion for Summary Disposition filed by the Minnesota Department of Health (Department or MDH) on May 2, 2012. Tsz Lai d/b/a Asian Hon (Respondent) filed a response to the motion on May 18, 2012. On June 13, 2012, the Administrative Law Judge directed the Department to respond to Respondent's memorandum and set a deadline of July 10, 2012. The Department submitted a response on that date. On July 16, 2012, the Respondent submitted a letter in response to the Department's response. The OAH record with respect to the motion closed on July 16, 2012.

Gina D. Jensen, Assistant Attorney General, represented the Department of Health. Tsz Lai represented herself with the assistance of her son, Simon Lai, but without legal counsel.

Based on all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED that:

1. The Department's Motion for Summary Disposition is **DENIED**; and
2. This matter will proceed to a contested case hearing to be scheduled in the near future.

Dated: August 15, 2012

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

The Respondent owns and operates a restaurant, Asian Hon, that is licensed by the Department called Asian Hon. The restaurant is located at 1135 First Avenue East in Shakopee.

Undisputed Factual Background

On February 10, 2011, the Department conducted an inspection of Asian Hon and noted 22 violations of the Food Code.[1] Department staff observed, among other things, that food was not stored at the proper temperature; food was stored in open galvanized metal cans; equipment, non-food-contact surfaces and utensils were not clean and sanitized; and dispensing utensils did not have handles and were not stored properly. In addition, Department staff observed that food was stored on the floor; ready-to-eat potentially hazardous food was not date marked; equipment did not meet National Sanitation Foundation (NSF) International Standards and/or was not in good repair; and there was no designated area for employees to eat and drink.[2] Department staff also observed that the Respondent failed to employ one full-time State certified food manager as required by Minnesota Rule 4626.2010.[3]

In its Food and Beverage Inspection Report (Inspection Report), Department staff noted that half of the violations observed on February 10, 2011, were previously identified during inspections that took place in 2009 and were never corrected.[4]

On March 11, 2011, the Department sent by certified mail a "ten day" letter to Respondent alleging violations of the Food Code that were identified in the February 10, 2011, Inspection Report.[5] The Department notified the Respondent that if she did not respond within 10 days, the Department would take additional enforcement action, including the possible assessment of an administrative penalty.[6] The Respondent submitted a timely response to the Department indicating that she had complied with the orders identified in the February 2011 Inspection Report.[7]

On May 4, 2011, the Department conducted a second inspection of Asian Hon. During this visit, Department staff observed 21 violations of the Food Code.[8] Of the violations observed, 18 were previously identified during the February 10th inspection.[9] Asian Hon had corrected four of the violations identified in the February 10th Inspection Report. Department staff identified the following three new violations: raw animal foods were stored above raw ready-to-eat food in the cooler; food was being thawed at room

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[1] Affidavit of Erin Gudknecht at ¶ 2; Affidavit of Mark Peloquin at ¶ 5.

[2] Gudknecht Aff. at ¶ 2.

[3] *Id*.

[4] Gudknecht Aff. at ¶ 3; Ex. K.

[5] Peloquin Aff. at ¶ 6.

[6] *Id.*

[7] *Id*.

[8] Gudknecht Aff. at ¶ 4; Peloquin Aff. at ¶ 7.

[9] Gudknecht Aff. at ¶ 4; Ex. L.

temperature; and the person in charge of Asian Hon that day could not demonstrate knowledge of foodborne disease prevention and the requirements of the Food Code. Department staff alleges also that the person in charge on May 4th lacked knowledge of Food Code requirements on date marking, cross contamination, cold holding temperatures, and proper sanitation and cleaning.[10] Following this inspection, the Department again issued orders to the Respondent directing her to correct the identified Food Code violations, including 10 items that were deemed "critical."[11]

On May 5, 2011, the Department held an "enforcement forum" to decide on an appropriate enforcement action for Respondent's violations of the Food Code.[12] The forum participants determined that a combination administrative penalty order, assessing a forgivable and nonforgiveable penalty, was appropriate based on the nature of the Respondent's violations.[13]

On May 26, 2011, the Department issued a Combination Administrative Penalty Order (APO) to the Respondent based on the alleged violations.[14] The Department imposed on the Respondent a forgivable civil penalty in the amount of $9,223 and a nonforgivable civil penalty in the amount of $777.[15]

The APO explained the Department's authority to order corrections and assess administrative penalties; identified the alleged violations; and directed the Respondent to demonstrate in writing, within 30 days of the date of the APO, that the alleged violations had been corrected as specified. The APO also notified the Respondent of her right to request a hearing to "review" the APO. The notice advised the Respondent that her request for a hearing must be received by the Department "within 30 days of the receipt of [the APO] or within 20 days after receipt of the director's determination that the corrective action is unsatisfactory."[16] The order stated further that the Respondent must state specifically that she is requesting a hearing and her reasons for doing so, and any facts on which she might rely.[17]

On or about June 17, 2011, Respondent submitted a response to the Department identifying the actions taken by Asian Hon to correct the 20 violations identified in the APO.[18] According to the response, most of the violations alleged in the APO had been corrected.[19] The Respondent also submitted a check to the Department in the amount of $777, representing the amount of the nonforgivable penalty.[20] The Respondent

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[10] *Id*.

[11] *Id*.

[12] Peloquin Aff. at ¶ 8.

[13] *Id*.; Ex. B.

[14] Peloquin Aff. at ¶ 20; Ex. B.

[15] *Id*.

[16] Ex. B at 6.

[17] Ex. B.

[18] Ex. D.

[19] *Id*.

[20] Peloquin Aff. at ¶ 21; Ex. D.

stated that Asian Hon did not want to be assessed any additional penalties and that it was working very hard to comply with the Food Code. The Respondent did not at this juncture specifically request a hearing to review the violations alleged in the APO.[21]

On June 24, 2011, MDH staff and Simon Lai, the son of Tsz Lai, had a telephone conference in which they discussed the corrective action plan submitted by Asian Hon on June 17, 2011.[22]

On June 28, 2011, the Department sent a letter to the Respondent by certified mail notifying her that her plan to complete the corrective actions required by the APO was approved.[23] The Department informed the Respondent that it would conduct a compliance inspection shortly after August 15, 2011, to determine whether all of the violations identified in the APO had been corrected.[24] The letter also notified the Respondent that her failure to comply with the approved plan would be cause for subsequent enforcement action and that the forgivable penalty of $9,223 would become due and payable immediately.[25]

On September 13, 2011, the Department conducted a compliance inspection of Asian Hon.[26] During the visit, Department staff determined that only half of the 20 violations identified in the APO had been corrected.[27] The Department staff noted that the following violations had not been corrected: food was stored in open galvanized metal cans; food was stored on the floor; equipment was not in good repair; non-food-contact surfaces, equipment, and utensils were not clean and sanitized. The Department staff noted also that ready-to-eat potentially hazardous food was not date marked; raw animal foods were stored above ready-to-eat food in the cooler; and the person in charge of Asian Hon could not demonstrate knowledge of foodborne disease prevention and the requirements of the Food Code. Again, Department staff alleged the person in charge lacked knowledge of Code requirements on date marking, cross contamination, cold holding temperatures and proper sanitation and cleaning.[28] The Department issued orders to the Respondent to correct the Food Code violations identified, including five items that were deemed critical.[29]

On October 19, 2011, the Department sent by certified mail and first class mail a "Due and Owing" letter to the Respondent.[30] The letter notified the Respondent that her failure to complete the corrective actions specified in the APO by the agreed-upon August 15 2011, deadline had resulted in the assessed forgivable administrative penalty

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[21] *Id*.
[22] Ex. E.
[23] Ex. E.
[24] Peloquin Aff. at ¶ 22; Ex. E.
[25] Ex. E.
[26] Gudknecht Aff. at ¶ 5; Ex. M.
[27] Gudknecht Aff. at ¶ 5; Exs. M and N.
[28] *Id*.
[29] *Id*.
[30] Peloquin Aff. at ¶ 24; Ex. F.

of $9,223 becoming due and payable. The letter stated further that Respondent's license to operate Asian Hon would be revoked in 20 days after receipt of the Department's letter unless the corrective actions specified in the APO were completed and the penalty paid.[31] The letter notified the Respondent of her right to request a hearing regarding the Department's determination. The letter directed the Respondent to file a written request for a hearing with the Division of Environmental Health within 20 days of receipt of the letter.[32]

The Respondent filed a written request for a contested case hearing on October 21, 2011, and November 1, 2011.[33]

On November 8, 2011, at the request of the Respondent, the Department conducted another inspection of Asian Hon to determine whether the corrective actions identified in the APO had been completed.[34] During the visit, Department staff observed that 17 of the 20 violations identified in the APO had been corrected.[35] By letter dated November 30, 2011, the Department notified the Respondent that the effective date of the revocation of her license would be extended to December 31, 2011, in recognition of her progress toward meeting the APO requirements.[36] The Department also informed the Respondent that if the violations were not corrected by that date, Respondent's license would be revoked and she would be required to discontinue operating Asian Hon.[37] The Department further stated that its finding of non-compliance with the APO had not changed and that the forgivable penalty of $9,223 had not been forgiven.[38]

By letter dated December 9, 2011, the Respondent requested that the Department reduce the forgivable penalty to $500.[39] The Respondent stated that Asian Hon had worked diligently to correct all of the alleged violations and asserted that a penalty of $9,223 should be reserved for the "most egregious and repetitive offenses that show intentional or flagrant disregard for patron health and safety."[40] The Respondent argued that the alleged violations in her case did not rise to this level. In addition, the Respondent maintained that the initial inspection was conducted during the busy lunch hour, when sinks and the microwave were temporarily soiled due to use.[41]

On December 19, 2011, the Department conducted another inspection of Asian Hon to determine the status of the three remaining uncorrected violations identified in

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[31] *Id*.

[32] Ex. F.

[33] Peloquin Aff. at ¶ 25.

[34] Peloquin Aff. at ¶ 26.

[35] Gudknecht Aff. at ¶ 6; Ex. O; Peloquin Aff. at ¶ 26.

[36] Peloquin Aff. at ¶ 27; Ex. G.

[37] *Id*.

[38] *Id*.

[39] Peloquin Aff. at ¶ 28; Ex. H.

[40] Ex. H.

[41] *Id.*

the APO.[42] During the visit, the Department observed that the dishes were not clean and sanitized; the food manager certificate was not posted; and equipment was not in good repair.[43] The Department issued orders to the Respondent to correct the Food Code violations.[44]

On December 22, 2011, the Department sent a letter to Respondent by certified mail informing her of the Department's determination that she had substantially met the requirements of the corrective actions outlined in the APO and that she would be eligible to renew her license to operate for 2012.[45]

By letter dated January 18, 2012, the Department notified the Respondent that its enforcement team had reviewed her request to reduce the penalty assessed against her for failing to comply with the APO and had determined that there was no cause to reduce the penalty.[46] The Department informed the Respondent that the penalty was due and owing.[47] The Department also noted that the Respondent's request for a hearing to contest the Department's determination of noncompliance had been delayed while the parties attempted to resolve the issues without a hearing. The Department advised the Respondent that she should contact the Department if she wished to pursue a hearing.

By letter dated January 23, 2012, the Respondent notified the Department that she was requesting a hearing to contest the Department's determination of noncompliance.[48]

On March 12, 2012, the Department issued a Notice and Order for Hearing and Prehearing Conference in this matter. A Prehearing Conference was held on April 12, 2012, and the Department thereafter filed this motion for Summary Disposition.

Procedural Posture

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[49] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding

[42] Gudknecht Aff. at ¶ 7; Ex. P; Peloquin Aff. at ¶ 29.
[43] Gudknecht Aff. at ¶ 7; Ex. P.
[44] *Id*.
[45] Peloquin Aff. at ¶ 30; Ex. I.
[46] Peloquin Aff. at ¶ 31; Ex. J.
[47] *Id*.
[48] Peloquin Aff. at ¶ 32.
[49] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

contested case matters.[50] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[51]

The moving party, in this case the Department, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.[52] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[53] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.[54]

When considering a motion for summary judgment, the ALJ must view the facts in the light most favorable to the non-moving party.[55] All doubts and factual inferences must be resolved against the moving party.[56] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[57]

Regulatory Framework

The Commissioner of Health (Commissioner) is responsible for adopting and enforcing rules establishing standards for food and beverage service establishments, hotels, motels, lodging establishments, and resorts.[58] Under this authority, the Commissioner has adopted Minnesota Rule Chapter 4626 (Food Code), which provides various requirements and standards for food and beverage service establishments. A "food and beverage service establishment" is defined, in relevant part, as a building that is used to prepare, serve or otherwise provide food or beverages, or both, for human consumption.[59] To be licensed, a food and beverage service establishment must comply with the standards and requirements set forth in the Food Code.

The Health Enforcement Consolidation Act of 1993, codified at Minn. Stat. § 144.989 to 144.993, authorizes the Commissioner of Health to issue administrative penalty orders and corrective orders for violations of statutes and rules that the Department is charged with enforcing, including the Food Code. The Act authorizes the

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[50] *See* Minn. R. 1400.6600.
[51] *Illinois Farmers Insurance Co. v. Tapemark Co.,* 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).
[52] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).
[53] *Id.; Murphy v. Country House, Inc*., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).
[54] *Carlisle*, 437 N.W.2d at 715 (*citing, Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).
[55] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
[56] *See, e.g., Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich,* 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).
[57] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250-51 (1986).
[58] Minn. Stat. § 157.011.
[59] Minn. Stat. § 157.15, subd. 5.

Department to assess forgivable and nonforgivable penalties in an amount up to $10,000 for violations of governing statutes and rules identified in an inspection.[60]

In determining the amount of a penalty, under Minn. Stat. § 144.99, subd. 4, the Commissioner may consider the following factors:

1. The willfulness of the violation;
2. The gravity of the violation, including damage to humans, animals, air, water, land or other natural resources of the state;
3. The history of past violations;
4. The number of violations;
5. The economic benefit gained by the person allowing or committing the violation; and
6. Other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.[61]

When the Department assesses a forgivable penalty, the penalty must be forgiven "if the commissioner determines that the violation has been corrected or the person to whom the order was issued has developed a corrective plan acceptable to the commissioner."[62] If, however, "the person subject to the order has provided information to the commissioner that the commissioner determines is not sufficient to show the violation has been corrected or that appropriate steps have been taken toward correcting the violation," the penalty is due and payable.[63]

Analysis

In this case, the Department assessed Respondent a forgivable penalty in the amount of $9,223. Respondent submitted a plan to the Department to correct all of the Food Code violations by August 15, 2011. The Department approved the Respondent's plan and notified the Respondent that it would conduct a compliance inspection sometime after that date. On September 13, 2011, the Department conducted a compliance inspection and determined that only 10 of the 20 violations identified in the APO had been corrected.

The Department maintains that it is undisputed that Asian Hon failed to correct the 10 remaining violations identified in the APO by August 15, 2011, and that therefore, as a matter of law, the forgivable penalty assessed to the Respondent is due and owing.

The Respondent, on the other hand, contends that it did correct all of the identified violations by August 15, 2011, and argues that the penalty should be forgiven. In its submission filed May 18, 2012, the Respondent disputes each of the 10 violations

[60] Minn. Stat. § 144.99, subd. 4.
[61] Minn. Stat. § 144.991, subd. 1.
[62] Minn. Stat. § 144.991, subd. 4(a).
[63] Minn. Stat. § 144.991, subd. 4(a)(2).

the Department determined was not corrected. For example, the Respondent contends that the food the Department noted was "stored" in open galvanized cans was actually "freshly opened" and being used in the preparation of food. Likewise, the Respondent asserts that the ready-to-eat food (rice noodles and egg rolls) that the Department noted lacked a date mark, had been made fresh that day. Under Minn. Rule 4626.0400, only ready-to-eat food held in a refrigerator for more than 24 hours must be marked with the date it was prepared. The Respondent also disputes the Department's findings regarding the cleanliness of the restaurant's sink, microwave and floor.

As an initial matter, the Administrative Law Judge finds that Respondent timely requested review of the APO. The Order provides that the Respondent must request a hearing within 30 days of receipt of the APO or within 20 days after receipt of the Department's determination that the corrective action is unsatisfactory.[64] While the Respondent did not specifically request a hearing within 30 days of receipt of the APO, the Department approved the Respondent's corrective action plan and gave the Respondent until August 15, 2011, to correct the identified violations. Following the September 13th compliance inspection, the Department notified the Respondent, by letter dated October 19, 2011, that the corrective action was unsatisfactory. The Department informed the Respondent that she had 20 days to request a hearing.[65] The Respondent timely requested a hearing after receipt of this letter.[66] Therefore, the issue of whether the administrative penalty is appropriate based on Respondent's failure to correct the 10 violations identified by the Department is properly before the Administrative Law Judge.

After careful consideration of the record and the competing arguments of the parties, the Administrative Law Judge concludes that there are genuine issues of material fact that preclude granting the Respondent's motion for summary disposition. While there may be no dispute that Asian Hon lacked a full-time State certified food manager, factual disputes remain for hearing with respect to many of the other violations. Because these disputed facts are material to Respondent's compliance with the correction plan and credibility determinations are required to resolve some of them, this matter is not appropriate for summary disposition. The Department's motion for summary disposition is denied and this matter will proceed to an evidentiary hearing.

R.C.L.

[64] Ex. B at 6.
[65] Ex. F.
[66] *See*, Minn. Stat. § 144.991, subd. 4.